IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 14

EUGENE DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the United States Court of Appeals is reported in 171 F. (2d) 986. No written opinion was rendered by the trial court on the issues involved herein. See 72 Fed. Supp. 417.

Jurisdiction

The judgment of the Court of Appeals was entered on October 12, 1948 (R. 417). By order dated October 30, 1948, Chief Justice Vinson extended the time for filing the

petition for writ of certiorari to November 29, 1948 (R. 419). The petition was filed on November 27, 1948, and was granted on June 27, 1949 (337 U. S. 954), limited to the question whether government employees could properly serve on the jury which tried petitioner. The jurisdiction of this Court rests upon 28 New United States Code, Section 1254.

Constitutional Provisions, Statutes and Executive Order Involved

The following constitutional provisions, statutes and Executive Order are set out in the Appendix to this brief:

1. Constitution, Article III, Section 2, Paragraph 3.
2. Constitution, Amendment VI.
3. Section 121(b), Legislative Reorganization Act of 1946.
4. Executive Order No. 9835.

Statement

The petitioner, Eugene Dennis, is the General Secretary of the Communist Party of the United States (R. 165). The indictment (R. 3-4) under which he was convicted charged that the petitioner "having been duly summoned and served as a witness by the authority of the House of Representatives through its Committee on Un-American Activities" (R. 4), wilfully defaulted in appearance in violation of Section 192 of 2 United States Code. These criminal proceedings against the petitioner were initiated by the House Committee on Un-American Activities pursuant to the provisions of Section 194 of 2 United States Code (Govt's. Exhs. 5, 6, 7, R. 373-378).

The case against the petitioner was called for trial on June 23, 1947 (R. 333). During the course of the argument

on a motion for continuance, the prosecutor stated (R. 39): "Our office looks on it as an important case, the Department of Justice looks on it as an important case, and I know the gentlemen on the Hill before whom the contempt took place look on it as an important case".

Pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure, the petitioner moved for a transfer of the case to another District upon the ground that there existed in the District of Columbia a prejudice so great against the petitioner that he could not obtain a fair and impartial trial (R. 27). In his affidavit in support of the motion for transfer (R. 27-32), the petitioner maintained that he could not obtain a trial by "an impartial jury" in the District of Columbia, if government employees were permitted to serve. The petitioner stressed that government employees were subject to the provisions of Executive Order 9835, 12 Fed. Reg. 1935 (1947) providing for the discharge from government employment of any person concerning whom there was "reasonable grounds * * * for belief that * * * (he) * * * is disloyal to the Government of the United States". Among the "activities or associations which may be considered in connection with the determination of this loyalty", the Executive Order included "sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as * * * Communist" (R. 28). The petitioner urged that the consequence which flowed from the Executive Order made it impossible for him, "a leader of the Communist Party" (R. 28), to secure a fair and impartial trial, "particularly when the charge against him is laid by the Committee on Un-American Activities" (R. 28). Reviewing the onerous requirements of the Executive Order: the penalties which fell upon Government employees who displayed undefined "sympathetic association" with members of the Communist Party (R. 29); the demands by members of the House Committee on Un-American Activities on the floor of Congress for immediate prosecution and conviction of the petitioner (R. 29);

the widespread fear which had been engendered among government employees in the District of Columbia by the conduct of such agencies of Government as the House Committee on Un-American Activities, the Federal Bureau of Investigation, and the Department of Justice, "a police state atmosphere in which neither justice nor free speech can be assured" (R. 32), the petitioner urged upon the trial court that "a fair trial in accordance with the established American traditions and the Constitution of the United States" (R. 32) would be impossible if government employees were required to serve as jurors in the trial of the cause. The motion for change of venue was denied at the opening of the trial, just prior to the examination of the jurors on voir dire (R. 41).

The first twelve jurors having taken their seats in the jury box (R. 46), the prosecutor identified the case, in part, as follows (R. 47-48):

> "The defendant is charged with violation of Title 2, Section 192, of the United States Code. He is charged with having been guilty of contempt of the House of Representatives. The indictment states in detail that on April 9th, of this year, after he had been previously summoned by a committee of the House of Representatives, known as the Committee on Un-American Activities, to be present and give testimony before that committee on that date, and that he made wilful default.
>
> The Government expects to call in support of the case all or some of the following witnesses: First, Congressman John Parnell Thomas, of New Jersey. He is the gentleman standing by the wall; Congressman Karl Mundt. Congressman Mundt is expected to be here. And also Robert Stripling, Chief investigator of the House Un-American Activities Committee. Also Mr. Edward K. Nellor."[1]

Counsel for the petitioner challenged all government employees for cause (R. 64). The Government replied:

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[1] Mr. Nellor was identified in the record as the Washington correspondent for the New York Sun (R. 242).

"It has never been done, your Honor, to challenge government employees as such" (R. 65). The trial court added: "Not since the law was amended" (R. 65), and overruled the challenge (R. 65).

Three peremptory challenges were available to each side (District of Columbia Code, Title 23, Sec. 107). The petitioner exhausted his peremptory challenges (R. 95), exercising two of the three against government employees (R. 51, 82, 54, 71). The Government exercised two of its three peremptory challenges against non-governmental employees (R. 69, 79). Of the jurors finally selected (R. 105), seven were government employees. Juror Grant had been employed for about 29 years in the "City Post Office" as a letter carrier (R. 55). His son was employed by the Bureau of Standards (R. 57). Juror Grigsby was a card punch operator in the Navy Department, Supplies and Accounts Branch (R. 56). She had been employed for about four and a half years (R. 56). Juror Helford was a clerk in the Department of Commerce (R. 67) with a cousin that worked for the Navy (R. 68). Juror Jones was a Post Office clerk, employed for two or three years (R. 76). Juror Mackall was a carrier in the Post Office Department, so employed for 20 years (R. 83). His wife was "with the D. C. Government" (R. 83). Juror Neff was with the Naval Gun Factory (R. 89). He had been in the employ of the Government for about 12½ years (R. 89). Juror Parham was in the employ of the Government Printing Office (R. 92). He had been with the Government about 25 years (R. 92). All of the jurors expressed the belief that they could render a fair and impartial verdict.

The prosecutor's opening statement reminded the jury "that for some time the defendant in this case has been a member of the Communist Party" (R. 106); "• • • he was at that time and is now—the defendant—secretary of the Communist Party" (R. 107). The Committee on Un-American Activities "at that particular time was taking testimony on the activities of the Communist Party in the United States and the activities of its members • • •

was examining, under the law, general propaganda conditions of an un-American and subversive source in this country" (R. 107).

Before calling any witnesses, the prosecutor introduced into evidence, and read to the jury, the following exhibits: (a) An excerpt from the Legislative Reorganization Act of 1946 setting forth the powers of the House Committee on Un-American Activities (R. 155).[2] (b) House Resolution 2 attested by the Clerk of the House and under its seal attesting that the House of Representatives of the Eightieth Congress had been organized (R. 154); (c) House Resolution No. 5 renewing the authority of the House Committee on Un-American Activities (R. 155); (d) Certification from the Clerk of the House of Representatives that Congressmen Thomas, Mundt, McDowell, Nixon, Vail, Wood, Rankin, Peterson and Bonner were members of the Committee on Un-American Activities (R. 156); (e) House Resolution 193 calling upon the Speaker of the House of Representatives "to certify * * * as to the wilful, deliberate, and inexcusable refusal of Eugene Dennis * * * to appear before the said Committee on Un-American Activities * * * to the United States Attorney for the District of Columbia, to * * * be proceeded against in the manner and form provided by law" (R. 159); (f) the certification of the Speaker of the House of Representatives to the United States Attorney (R. 159); (g) copy of House Report 289 submitted "by Mr. Thomas of New Jersey from the Committee on Un-American Activities" (R. 160) set-

[2] The prosecutor informed the jury that the House Committee has power "to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda as instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation" (R. 153). The prosecutor also read to the jury the powers of the Committee to issue compulsory process for persons and papers (R. 154).

ting forth the contents of the subpoena served upon the petitioner, the return of service by Robert E. Stripling, Chief Investigator of the Committee, and the finding of the Committee that the petitioner was "in contempt of the House of Representatives of the United States" (R. 162).

John Parnell Thomas was the first witness called by the Government (R. 162). He testified that he was the Chairman of the Committee on Un-American Activities of the House of Representatives, "a standing Committee of the House" (R. 163). On March 26, 1947, when the petitioner voluntarily appeared before the Committee, there was under consideration by the Committee two bills "about whether or not the Communist Party should be outlawed in the United States" (R. 174). He had reported the default of the petitioner on April 9, 1947 to the House of Representatives (R. 174). Robert E. Stripling, the second witness, testified that he was "the clerk and chief investigator of the Committee on Un-American Activities, U. S. House of Representatives" (R. 218). When the petitioner was served with the subpoena, there were "fifty members of the press present" (R. 222). He had been present at the April 9th meeting of the Committee when Congressman Mundt presided (R. 228). In response to the inquiry as to what matters were being considered by the Committee on Un-American Activities on April 9th, he answered, "The activities of the Communist Party of the United States" (R. 230). Sound movies were taken in connection with the service of the subpoena on the petitioner by "Paramount Newsreel, Universal, and I believe it was Movietone" (R. 231). The third witness was Edward Kenneth Nellor, who testified that he was the Washington correspondent for the New York Sun (R. 242) and had witnessed the service of the subpoena. The fourth witness was Karl E. Mundt (R. 248). He testified that he was a representative from South Dakota "serving my fifth term" (R. 249). He was the next ranking member of the Committee, "next to Mr. Thomas" (R. 249), and had presided at the April 9th meeting of the Committee.

The petitioner called as a witness in his behalf Vito Marcantonio, a member of the House of Representatives serving his sixth term in Congress (R. 272). The cross-examination of the witness by the prosecutor was in the following pattern:

> "Q. Among your acquaintances, how many friends do you have who are Communists?" (R. 285).
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> • • • • • • •
>
> "Q. Among your friends and acquaintances, how many close friends do you have who are members of the Communist Party?" (R. 286).
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> • • • • • • •
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> "Q. Aren't you in Congress the champion of the Communist Party?" (R. 286).
>
> • • • • • • •
>
> "Q. And haven't you fought fight after fight for the Communist Party in the halls of Congress?" (R. 286).

In his opening argument to the jury (R. 298), the prosecutor stated:

> "Mr. Fihelly: May it please Your Honor and you ladies and gentlemen of the jury and prospective juror: Court opened this morning with the substantial words: 'God save the Government of the United States and this Honorable Court.' Now, may the courts always be opened in this District with those words.
>
> You ladies and gentlemen of the jury are privileged to try one of the most important cases that has ever been tried in this District, the case of the United States against Eugene Dennis, secretary of the Communist Party.
>
> The evidence in this case shows that Dennis set himself up as the single, as the leader of the Communist Party, and believed he was bigger than and greater than and more important than the United States Government. God help us if he or anyone else, as the symbol of that party, gets away with that, if I may use the language of the street.
>
> • • • • • •

In addition to the committee having been made a standing committee, ladies and gentlemen of the jury, we have the fact as has been stated by counsel and re-emphasized in his questions to you when we were all attempting to get a fair and impartial trial jury, that the President of the United States issued a Loyalty Order, and we have all those facts to consider" (R. 300).

* * * * * * *

"I again say: Lord help the Government of the United States if an individual can think he is so big and so bombastic that he can make utterances like that, and defy the law, and defy the Representatives who have been elected by the citizens of this country to represent the Government of the United States" (R. 303).

In his closing remarks to the jury (R. 325), the prosecutor stated (R. 326):

"Dennis was operating on the Committee on Un-American Activities on that date and part of the Government of the United States, and by your verdict you shall tell him whether he can get away with that or whether others can get away with it or whether the law that was passed with respect to a wilful default shall be enforced in the District of Columbia where a person has been properly subpoenaed.

* * * * * * *

If any individual can hold himself up as greater than the Congress of the United States, then, as I say, God help Congress and God help our Government; and I know by your verdict you will say that this defendant or no one else can do so and get away with it" (R. 331).

The court charged the jury (R. 331), in part, as follows (R. 334-335):

"In this case the defendant is on trial charged with an offense known in the law as contempt of the House of Representatives of the United States. The specific charge against him is that, having been summoned and served as a witness by the authority

of the House of Representatives, through its Committee on Un-American Activities, to appear and give testimony before this committee at its session in the District of Columbia on April 9, 1947, on matters committed to this committee by the statute and resolution which have been brought to your attention during the trial, and knowing that he was summoned and served, he wilfully failed to appear and thereby made wilful default.

* * * * * *

Now, this prosecution was instituted pursuant to a statute known as Section 192, Title II, of the United States Code. The provisions of that statute, so far as they are material, are short and simple. They read as follows, so far as material:

> 'Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House of Congress or any committee of either House of Congress, wilfully makes default, shall be guilty of misdemeanor'" (R. 337).

The jury returned a verdict of guilty (R. 342). In his motion for a new trial and in arrest of judgment (R. 346), petitioner again maintained that he had not received a trial by a fair and impartial jury (R. 348). Counsel for the petitioner stated that "it was impossible to get a fair trial in a case of this sort where government employees were on the jury" (R. 349). The motions were denied (R. 353). Upon appeal to the Court of Appeals, the petitioner again urged as error the overruling of his challenge to all talesmen who were government employees (R. 413). The Court of Appeals affirmed the conviction, holding that "blanket disqualification" (R. 414) of federal employees for jury service was unjust, and that the jurors in petitioner's trial had on their voir dire asserted complete absence of prejudice (R. 414). This Court granted certiorari (R. 419).

Specification of Errors to be Urged

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding, under the circumstances of this case, that the District Court's denial of petitioner's challenge to jurors who were government employees was not a violation of petitioner's constitutional right to a trial by a fair and impartial jury within the meaning of Amendment VI to the Constitution and Article III, Section 2, paragraph 3 of the Constitution.

2. In affirming the judgment of conviction of the District Court.

Summary of Argument

The decisions of this Court in *Crawford* v. *United States*, 212 U. S. 183; *United States* v. *Wood*, 299 U. S. 123, and *Frazier* v. *United States*, 335 U. S. 497, establish the fact that while government employment in itself may not create a blanket disqualification for jury service, there are particular circumstances in which such disqualification is necessary in order to insure a fair trial. Moreover, under these cases the courts are required where actual bias of government emplyees is asserted in a case in which the Government is a party zealously to protect the interests of the defendants by broadly investigating all of the circumstances attendant upon the prospective juror's employment and not confine themselves merely to eliciting the subjective responses of the prospective jurors. The fact situations which led this Court in the *Wood* and *Frazier* cases to reject challenges of prospective jurors who were government employees are not present here. This is not an ordinary criminal trial and no consideration relating to timeliness or waiver operates to bar petitioner's challenge.

On the contrary, present here are precisely those "particular circumstances" which, under the *Wood* and *Frazier* cases, require disqualification of prospective jurors who are government employees. The nature of the interest sought to be vindicated in this case is that of actual, not nominal, sovereignty. A further unusual circumstance in this case is that the jurors who were government employees were forced to choose between Congress which fixes the terms of their employment and the petitioner. In addition the instigator of the contempt proceeding against petitioner and the principal witness at the trial was the House Committee on Un-American Activities which has always exerted strong pressures upon government employees who do not conform to its conception of "Americanism." The seven government jurors were, moreover, subjected to the terms of Executive Order 9835 which provides that the activities and associations of federal employees which may be considered in connection with the determination of "disloyalty" include sympathetic association with any organization or group designated by the Attorney General as Communist. In a trial such as the one involved here where the defendant was the General Secretary of the Communist Party, personal security of a government employee would apparently be enhanced if he voted for conviction and endangered if he voted for acquittal.

The activities of the Government in the field of employee loyalty have engendered in the federal establishment hostility to and malice against Communists. This is inevitable when indoctrination occurs in the coercive context of the employment relationship. Such active malice is a particular circumstance which was not present either in the *Wood* or *Frazier* cases and which even at common law effectively supported a challenge of a servant of the crown by a defendant in a crown case. Discharge for disloyalty is a particularly strong sanction akin to an attaint of a juror at common law.

The compulsions to which government jurors in this case were exposed must be considered in their collective and cumulative impact and against a background of community prejudice and fear.

No justification exists for sustaining the decision below. In the context of this case the statements of government jurors that they were not biased against the petitioner and would render a fair verdict were immaterial. In any event, the determination of the qualifications of a juror is a judicial function and the court is not bound by the statement of a juror. This is the teaching of the *Crawford*, *Wood* and *Frazier* cases. It was particularly improper to accept a disclaimer of prejudice in a case of this kind involving deeply-felt values and imponderables of which the juror could have no fore-knowledge. The disqualification requested by petitioner was no more "blanket" than the scope of the attacks upon the political independence of government employees. Nor may it be termed, as did the court below, a bill of attainder. On the contrary the inbred character of the petitioner's trial was a legislative trial in the nature of an attainder. Nor was the reliance of the court below on the *Wood* case proper. The carefully erected safeguards of this decision have been ignored by the courts in the District and the decision improperly used to overrule challenge of government employees as jurors in cases where Chief Justice Hughes plainly contemplated that such a challenge would be allowed by the courts. Consideration of vicinage and of cross section do not justify petitioner's jury. For these historic protections of defendants cannot be converted into their opposite.

Because this case has political aspects the requirements of an impartial jury have particularly strong vitality. For the origin and growth of the jury is explained in part by its role as a safeguard of political liberty. The particular circumstances of this case clearly establish that the constitutional provisions for a trial by a fair and impartial jury were not satisfied.

ARGUMENT

Introductory Note

This case is one of a group of cases, growing in number, in which criminal sanctions are being employed in a drive against political opposition and non-conformity.

An important aspect of that pattern has emerged in the District of Columbia where a number of cases have been brought under Section 192, Title II, U. S. Code, charging contempt of the House of Representatives on the part of various individuals because of alleged default before the House Un-American Activities Committee. The individuals who are defendants in this series of cases are identified with organizations under intense attack by the House Committee on Un-American Activities.

All of the defendants in this series of cases have been tried in the District of Columbia, although it is not the home of any of the defendants and is removed from the facilities normally available for their defense. The place of trial is the seat of intense incitement and passion against opponents of the parties in power and dissenters from the political status quo, as these defendants are. Moreover, these defendants have been tried by judges, of whom a great many have formerly been Federal prosecutors in the District of Columbia. The trials before these judges and before the juries of this community have all been on indictments asked for and obtained by United States attorneys at the request of the House Un-American Activities Committee, supported by resolutions of the House of Representatives.

In all instances the defendants have been tried before a jury composed, at least in part, of government employees. See *Bryan* v. *United States*, 174 F. (2d) 525;

Fleischman v. *United States*, 174 F. (2d) 519; *Lawson* v. *United States*, 176 F. (2d) 49; *Trumbo* v. *United States*, 176 F. (2d) 49; *Morford* v. *United States*, 176 F. (2d) 54, and *Marshall* v. *United States*, Case No. 9864, decided June 29, 1949—all in the Court of Appeals for the District of Columbia.

This Court has granted certiorari in the petitioner's case in order to consider whether the presence of government employees on the jury, who in fact constituted a majority of the jury which tried petitioner, resulted in a trial by a jury which was not impartial. We are convinced that governmental activities in the area of employee "loyalty", together with other considerations which are discussed in detail in this brief, have rendered government employees ineligible to serve on juries in cases of this type. We believe that these activities seriously violate the constitutional rights of government employees. That issue, however, is not involved in this case. What is involved is that the violation of the rights of government employees must not be permitted to become a means for the violation of the constitutional rights of others as well.

The injuries which the petitioner suffered because of the presence on the jury of government employees, residents of the District of Columbia and its environs, are particularly severe because the petitioner is the General Secretary of the Communist Party, an organization which has been an outstanding target of prejudice-creating instrumentalities in the District, and because the jurors were constantly reminded that the case involved a test of strength between the petitioner and the Government of the United States.

I

Principles governing the qualification of prospective jurors who are government employees.

This Court has had before it the general question of whether government employees may properly serve on juries in which the Government is a party, in three cases, *Crawford* v. *United States*, 212 U. S. 183; *United States* v. *Wood*, 299 U. S. 123, and *Frazier* v. *United States*, 335 U. S. 497. We think it is accurate to summarize the rulings of these cases as follows:

1) While the fact of government employment in itself may not always create a blanket disqualification for jury service of government employees in a case in which the Government is a party, nevertheless there are special circumstances in which such disqualification is necessary as a matter of law in order to insure a fair trial.

2) Even if government employees under such circumstances are not disqualified, because of a bias implied in law, they may be challenged for actual bias.

3) In investigating actual bias, the courts—particularly in the District of Columbia—must be particularly zealous to protect the interests of defendants.

4) An investigation of actual bias should not be confined to eliciting the subjective responses of the prospective jurors, but must include a consideration of all of the circumstances of the prospective juror's employment.

In the *Crawford* case, the prosecution was for conspiracy to defraud the United States in relation to a contract with the Post Office Department. It was charged

that the defendant had corruptly agreed with an official of the Post Office Department to pay him a sum of money in return for the acceptance by the Department of the bid of the firm of which the defendant was a member. The trial court overruled a challenge to a juror who was a druggist, and in whose store was a subpostal station, with the juror acting as clerk in charge. This Court reversed, holding the juror disqualified for cause as a juror as a matter of law because of his implied bias.

Although the holding in the *Crawford* case was subsequently restricted by this Court, we submit, nevertheless, that two of its basic teachings survive and have present vitality.

First, the Court in the *Crawford* case, in explaining the basis for the fact that the disqualification is implied in law, pointed out that the bias of a prospective employee juror could not be adduced on the basis of his subjective response (212 U. S. 183, 196):

> "Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most widely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given."

Second, the Court pointed out that the judgment requiring disqualification is based upon an evaluation of *possibilities* (212 U. S. 183, 197):

> "It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror."

The *Wood* case involved a charge of petty larceny from a department store in the District of Columbia. The qualifications of three jurors were at issue; one being a widow of a Civil War Veteran who was a recipient of a pension, the other two being clerks, one of whom was employed in the Treasury Department, and the other in the Navy Yard.

The decision in the *Wood* case confirms the statutory removal (District of Columbia Code, Sec. 11-1420) of the absolute disqualification which the *Crawford* case had imposed on Federal employees to sit as jurors in criminal cases. The *Wood* decision announces that government employees are no longer as a class disqualified from eligibility as jurors in all prosecutions. In re-examining the *Crawford* ruling, the Court in the *Wood* case pointed out (299 U. S. 123, 140):

> "It will be observed that the employment [of the juror in the *Crawford* case] was in the very department to the affairs of which the alleged conspiracy related."

The Court criticized (at p. 140) the decision to the extent that it "took a broader range and did not rest upon that possible distinction."

However, the Court made it clear that government employees may be disqualified in certain types of prosecutions.

> "We are unable to accept the ruling in the Crawford case as determinative here or to reach the conclusion that it was a settled rule of the common law prior to the adoption of the Sixth Amendment that the mere fact of a governmental employment, *unrelated to the particular issues or circumstances of a criminal prosecution*, created an absolute disqualification to serve as a juror in a criminal case" (299 U. S. 123, 141). (Italics supplied.)

> "We think that the imputation of bias simply by virtue of governmental employment, *without regard to any actual partiality growing out of the nature and circumstances of particular cases*, rests on an assumption without any rational foundation" (299 U. S. 123, 149). (Italics supplied.)

> "It is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. *Unless the suggestion be taken to have reference to some special and exceptional case* it seems to us far-fetched and chimerical" (299 U. S. 123, 150). (Italics supplied.)

The Court merely assimilated government employees to private employees and recognized that just as there are numerous instances where bias is imputed to a class of private individuals without regard to whether the particular individual of the class that is challenged is, in fact, biased or prejudiced,[3] so under appropriate circumstances, government employees as a class may be disqualified to serve as jurors without regard to the actual bias of the individual juror.

Even with respect to the determination of actual bias, the Court made it clear that objective circumstances, rather

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[3] See, for example, *Anderson* v. *Todd Shipyard Corp.*, 63 Fed. Supp. 229; *Miller* v. *U. S.*, 38 App. D. C. 361; *Young* v. *Marine Ins. Co.*, Cranch C. C. (1 D. C. 452, Fed. Cas. No. 18, 163).

than subjective response of the prospective juror, are determinative and that judicial inquiry—particularly in the District—must be thorough and complete in establishing the existence of such circumstances.

> "All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror. In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature of circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him" (299 U. S. 123, 133-134).

And again:

> "We repeat, that we are not dealing with actual bias, and, *until the contrary appears, we must assume that the courts of the District, with power fully adequate to the occasion, will be most careful in those special instances,* where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused" (299 U. S. 123, 150). (Italics supplied.)

The *Frazier* case involved a conviction under the Harrison Narcotics Act, 26 U. S. C., Section 2553. All of the members of the jury were government employees, and one of them, and the wife of another, came under the same ultimate departmental supervision (the Treasury Department) charged by law with responsibility for administering and enforcing the statute involved. A divided court reaffirmed the *Wood* decision and rejected the challenge of the two employees mentioned above as untimely.

In addition to the untimeliness of the challenge, this Court in the *Frazier* case regarded as well-nigh decisive the circumstance that the petitioner appeared to be repudiating the consequences of his own selection of jurors.

In the instant case no contention could possibly be made that the petitioner's challenge of government employees as jurors was untimely. At the outset of the trial, a motion was made for change of venue on the ground that a fair trial would be impossible if government employees were permitted to serve (R. 27-32). At the earliest possible opportunity petitioner challenged for cause all government employees (R. 64) and, in contrast to the situation in the *Frazier* case, the petitioner used two of his three peremptory challenges against government employees (R. 51, 82, 54, 71).

In discussing the *Wood* case, this Court in the *Frazier* case quoted with approval (at p. 509) the statement in the *Wood* case that:

> "In criminal prosecutions the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested. It is difficult to see why a governmental employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good citizen is or should be * * *."

As we shall show in detail, this is not a case in which the Government is proceeding "simply as the instrument of the public in enforcing penal laws for the protection of society." The Court emphasized that it was reaffirming the *Wood* ruling insofar as that ruling removed disqualification arising out of government employment alone apart from the "nature and circumstances of particular cases." Moreover, in discussing the *Wood* case, the Court pointed out (at p. 511) that that decision "seems to contemplate implicitly that in each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection of the score of impartiality, * * *." As we shall show, such "solid basis of objection" is amply present here. Finally the Court again stressed (at p. 511) the view of the *Wood* case that it is "not only prejudice in the subjective sense but also such

as might be thought implicitly to arise 'in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise'."[4]

Precisely those exceptional circumstances are present in this case which, under the *Wood* and *Frazier* cases, require the disqualification of government employees as jurors as a matter of law. Moreover, under the standards laid down in those cases, such government employees were also disqualified for actual bias and it was a manifest abuse of discretion to permit them to serve.

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[4] Because of the compulsions imposed upon the jurors here flowing from demands of "ideological loyalty" the following statement from Justice Jackson's dissenting opinion in the *Frazier* case (at p. 515) is strikingly apt here:

> "Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to '* * * crook the pregnant hinges of the knee where thrift may follow fawning'. So I reject as spurious any view that government employment differs from all other employment in creating no psychological pressure of dependency or interest in gaining favor, which might tend to predetermine issues in the interest of the party which has complete mastery over the juror's ambition and position. But even if this suspicion can be dismissed by the Court as a mere phantasy, it cannot deny that such a jury has a one-sided outlook on problems before it and an appearance of government leverage which is itself a blemish on the name of justice in the District of Columbia."

II

The circumstances of this case made it inappropriate for federal employees to serve on the jury.

A number of circumstances decisively distinguish this case from the cases discussed in the preceding section of this brief and present the very situation described in those cases when it becomes inappropriate to permit government employees to serve on a jury in a case involving the Government.

Each of these circumstances separately, in our view, requires the conclusion that government employees were not qualified to sit as jurors as a matter of law in this case and that they were also disqualified for actual bias. When all of these circumstances are considered together we submit that these conclusions are irresistible.

A marked distinction between this case and a case such as the *Wood* case or *Frazier* case lies in the character of the interest which is sought to be vindicated. In the *Wood* and *Frazier* cases the nature of the interest which the Government sought to vindicate was that of a formal prosecutor, the representative of the people, proceeding against the accused as the keeper of the peace.

But this is a contempt case. The prosecutor is not a formal representative of a nominal sovereignty. In this case the Government of the United States has asserted an actual, deep, serious determined self-interest. It asserts that it has been attacked directly by the accused with respect to its orderly functions of government. Its mandates are alleged to have been broken, flouted. It harshly calls upon its law-enforcement agencies for vindication. In all of its solemn sovereign dignity, it approaches one of its own tribunals and as a direct, injured, demanding suitor it calls upon the court to punish the accused and indeed, for punishment as severe as the law will permit.[5]

[5] On the floor of Congress, while debating the resolution to punish the petitioner for contempt, Congressman Mundt stated:

"I hope that whatever judge has before him this particular contempt case, after the House votes it, as I am sure the House

The jurors in the *Wood* or *Frazier* cases could hardly have been told, as the jurors in this case were, that the defendant "believed that he was bigger than and greater than and more important than the United States Government" (R. 298), that "Lord help the Government of the United States" if such defendant could "defy the law, and defy the representatives who have been elected by the citizens of this country * * *" (R. 303). It could hardly have been said of the accused in the *Wood* case or the Narcotics Act violator in the *Frazier* case that "if any individual could hold himself up as greater than the Congress of the United States, then, as I say, God help Congress and God help our government * * *" (R. 331).

This Court cannot say here, as it did in the *Wood* case (at p. 149), that "the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society * * *. It is difficult to see why a government employee, merely by virtue of his employment is interested in that enforcement either more or less than any good citizen should be."

Moreover, the government employees serving on the jury were called upon to choose, not between an abstract governmental power and the petitioner but between the *Congress* and the petitioner, between, on the one hand, the very body which is clothed with legislative power to determine the

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will, that the Judge will uphold the dignity of the Courts and the Constitution to the point of giving Eugene Dennis the maximum penalty allowable under the law which is 1 year in jail, plus a $1,000 fine." 93 Cong. Rec., 3815.

* * * * * *

"I want to say too that because I have every hope that Eugene Dennis will wind up in the penitentiary as the result of the present proceedings, that when and if that happy eventuality occurs. * * *" id., 3815.

Mr. Mundt agreed with Mr. Smith of Ohio, that the Attorney General would have failed in his duty and be subject to impeachment "if he does not prosecute these cases", id., 3815. If this be the threatened fate of the Attorney General, it is difficult to believe that government employees could render a fair and impartial verdict.

conditions of their tenure (for example, 18 U. S. C. Sec. 61) and the petitioner. In contrast to this case, the jurors in the *Wood* case could have acquitted without fear of affronting the branch of the Government which appropriates the funds for their salaries. Can it be seriously questioned that the failure of the jurors in this case to convict the petitioner would be recorded as an affront to the House of Representatives which had voted a contempt citation petition and certified to the United States Attorney, under the seal of the Speaker of the House of Representatives the alleged refusal of the petitioner to appear before the Committee on Un-American Activities? (R. 373-375).

More important, perhaps, in terms of pressures upon the employee jurors, is the fact that the instigator of the charges against petitioner and the prosecuting witness was the House Un-American Activities Committee. The record shows how completely the Committee identified itself with and how prominent its participation was in this case (*supra*, pp. 3-7).

The government-employee jurors could have acquitted the defendant in the *Wood* and *Frazier* cases without fear that they would be investigated and denounced as "subversive" by the agency sponsoring the prosecution. But we strongly doubt that any juror in this case was, or could be, free of the fear in view of the record of the House Un-American Activities Committee (to be discussed below) that an acquittal might bring in its wake an attack by the Committee, if not discharge and disgrace.

Finally, at the time the petitioner was tried, the members of the jury who were government employees had been subjected to a continuing attack upon and investigation of their political beliefs, to make absolutely certain that none of them was "subversive". At the time of the trial the Federal establishment had already been subjected to an intensive screening for the purpose of eliminating all employees who even, on the faintest evidence and the remotest basis, might be charged with membership in or

affiliation with or sympathy for Communist organizations or the Communist Party.

Many employees had been discharged for alleged subversive opinions and "Loyalty Order" (Executive Order 9835, 12 Fed. Reg. 1935) had been promulgated on March 22, 1947. This Order, only three months old at the time of the voir dire, marked the ultimate step in a long governmental process of attacks upon the political attitudes and beliefs of governmental employees. This Order will be discussed at a later point in this brief. It is sufficient for our present purposes to note with respect to the Order that it is initiated with the announcement that "each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States."

In that portion of the Order dealing with standards, Part V, the Order designates as a standard in determining disloyalty "membership in, affiliation with or sympathetic association with" organizations designated as Communist by the Attorney General. Finally, it must be noted that not only the files of the Federal Bureau of Investigation, but also those of the House Committee on Un-American Activities are designated as appropriate sources in determining employee "loyalty". In his summation, the prosecutor reminded the jury of the existence of the Order (R. 300).

In short, the government employee members of the jury at the time that this case was tried were faced with possible discharge and disgrace for sympathetic association with organizations such as those of which petitioner is a leader and on the basis of a determination by the head of the very Department of Government charged with responsibility for prosecuting this case.

The activities of the Government in the area of employee "loyalty" have made impartiality impossible in a case such as this. These activities constitute more than a mere process of screening from the Federal establishment employees or applicants for employment with non-conformist or unorthodox views. Considered in their total impact, they are

a positive method of conditioning the mind of the employee to a fear and a hatred of Communists and Communism, as a threat to the essential processes of government. These activities do more than create fearful or unwilling captives; they create converts. They infuse the Federal establishment with an active malice against those, such as petitioners, who stand in fundamental political opposition to the administration.

The government employees who served on the jury in the *Wood* and *Frazier* cases were not deluged upon all sides by a campaign of hate against those who commit petty larceny or violate narcotics statutes. They were not repeatedly reminded that it is virtually an obligation of government employment to show an active animus against those who are accused of such offenses. Their association with these accused of such offenses was not officially confined to hostile association.

It cannot be contended that civil servants have somehow managed to resist the unremitting campaign of pressure to abandon views of a progressive character on the grounds that they are Communistic, to escape the compulsions inherent in the employment relationship, and to take an independent view of their employer's desires and preferences.

Long ago this Court pointed out that even in the private employment relationship (*I.A.M.* v. *Labor Board*, 311 U. S. 72, 78) "slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." The coercive power of an employer's appeals is not lessened when they occur in connection with political views and attitudes, rather than in the choice or rejection of labor unions.

Moreover, the Government's campaign to rid the Federal establishment of progressives or those who are not anti-Communist has been supplemented and reinforced by an incessant barrage of propaganda in the press and radio and by the speeches and press releases of politicians who use the theme of "coddling Communists on the Federal

payroll" as safe political currency on any and all occasions.

Where jurors, in the coercive context of the employment relationship, are indoctrinated by their employer, the Government, with malice and hatred against a class of defendants of which the petitioner is so outstanding an example, can there be any question that as a matter of law such jurors should not be permitted to serve in a case brought by the Government against the petitioner?

Even at a time when the royal prerogative was so exalted as to lead commentators to deny the right at common law to challenge a servant of the crown either in principal or to the favour, it was recognized in a classic work on trial by jury, Giles Duncombe, *Trials per Pais* (9th Ed., 1793) that while a challenge for favour to the king might not lie on the part of the defendant in a criminal case such a challenge of a prospective juror for malice to a defendant might lie.

Thus Duncombe states (at p. 189):

> "In an action betwixt the king and a party, the subject cannot take any challenge for favour as in an indictment for barretry, &c., the defendant cannot challenge a juror for favour to the king."

Duncombe, however, further points out (at p. 203):

> "'Tis no challenge to say, the juror is king's tenant or that his is favourable to the king but it is good to say the sheriff or juror bears grudge or malice to the defendant where the king is party."

Thus Duncombe while seemingly allowing no challenge against a crown servant even for actual favour to the king (see *United States* v. *Wood*, 207 U. S. 119, 135-136), nevertheless asserts than an exception to this rule exists where what is shown in not favour to the crown but malice against the defendant.

Certainly it cannot be denied that, wholly apart from active malice against petitioner, fear of loss of employment

operates to destroy impartiality of government employees serving as jurors in a case such as this.

Can it be doubted that employees who in a case of this character should vote to acquit the petitioner, might have serious grounds of concern for their jobs?

In assessing whether it is reasonable to assume the existence of fear in the minds of such employees, we must bear in mind that the government employee is constantly confronted, either on the basis of his own knowledge or of the reports of newspapers and radio columnists, with the fact that employees have been discharged for "disloyalty" or for engaging in "subversive activities."

If examples of discharges of others for union activity are properly deemed to create fears in the minds of private employees with respect to their own activity (cf, *I.A.M.* case *supra*, at p. 78), how can it be said that discharges for political reasons do not operate to intimidate and coerce? Certainly, it cannot be contended that government employment renders employees more impervious to such pressures, for precisely the contrary is true. Government employees' concern for security of tenure is a dominating element in their relationship to their employer, and they normally respond far more sensitively to pressures when their job appears to be in the balance.

Finally, we must bear in mind that what the employee has been taught to fear is not merely discharge—although in itself it is a formidable source of pressure. The sanction is far stronger where "loyalty" is involved than the private employee's fear of termination. For what faces the government employee is not merely a discharge by an employer who regards an adverse vote on the jury by his employee as an act of faithlessness. It is not alone formal severance from the payroll that the government employee fears, it is rather the stigma of being branded "disloyal" or "subversive" or a "poor security risk", with all that is involved in terms of degradation, of good name, of future employment opportunities. See Andrews, *Washington Witch Hunt* (1948), pages 61-73.

For a government employee who is terminated or purged for such a reason is barred for all time from all government employment; a life's vocation is destroyed. *United States* v. *Lovett*, 328 U. S. 303. Moreover, he encounters grave if not insuperable difficulties in obtaining private employment. For what private employer will be so brave as to give employment to one branded as "disloyal" by his Government?

In short, we are not dealing with a discharge or termination drained of adverse color, the reasons for which may be readily explained. A private employee whose discharge follows a verdict favorable to his employer's opponent in a case in which he served on the jury feels no sense of shame, no reflection upon himself, no embarrassment in explaining why he was discharged.

But a government employee who is discharged because he shows "sympathetic association" with "Communism" suffers disgrace, a harsh punishment, the results of which may be profound and lasting. It is, in effect, an attaint. Cf. the *Lovett* case, *supra*. The great landmark judgment of the Court of Common Pleas in *Bushell's* Case (1 Vaughn 135) stands as a perpetual reminder that jurors in criminal cases are subject neither to attaint nor a fine by the crown. This case makes it clear that integral to the institution of trial by jury is the proposition that the individual can forfeit his liberty—to say nothing of his life—only at the hands of those who are in no way accountable directly or indirectly for what they do, and who are completely free of precisely those pressures and sanctions which confront government employees in a case such as this.

Under the "particular circumstances" of the case on which they sat and its relationship to their government employment, the seven government employees did not enter the jury box as impartial jurors.

III

Because of the "loyalty" programs and campaigns of which they have been victims for a 10-year period, government employees could not properly serve as jurors in this case.

Governmental activities in the area of employee "loyalty" which make it impossible for such an employee to serve as an impartial juror in a case of this sort have a long genealogy of substance.

Attempts to control political views and affiliations of government employees may properly be considered in three aspects. First, the House Un-American Activities Committee has, from its very inception, made the political views of government workers a target of unremitting attack. It was this Committee which pioneered in the techniques of smear and innuendo of broad charges and loose standards, of hit and run, which, to a large extent, became the pattern for similar activities in other branches of Government. The House Un-American Committee concentrates almost exclusively upon the technique of "exposure". Wherever possible the Committee has supplemented this sanction by influencing other organs of the legislature in sympathy with its program and methods to adopt more direct sanctions. See *United States* v. *Lovett, supra.* The record and the techniques of this Committee are of significance here not only because they shed a revealing light upon the emergence of the process through which government employees have lost their liberty, but also because it is this Committee—so prominently identified with the establishment of dangerous and arbitrary standards of "loyalty" as a condition of employment—which is the instigator of this prosecution and, indeed, its leading witness.

Second, the issue of employee "loyalty" became, long before the prosecution in this case was instituted, a concern, and indeed, a political strategy not only of the House Com-

mittee but also of many other organs of our Government. Attacks at various bureaucratic levels on the loyalty of government employees left their mark upon their political attitudes and independence.

Finally, Executive Order 9835 to which reference has already been made, and to which the government employees who served on this jury are subject, creates decisive economic compulsions and marks the culmination of attempts to assure the political conformity of government employees, and their orientation against views or attitudes which could, under the loose and sometimes bizarre standards of the day, be termed "communistic".

A. The House Committee on Un-American Activities

In 1938 the House Committee on Un-American Activities was established. From the very first the Committee took a particular interest in "communist infiltration" into government. In 1939, Congressman Dies released to the press a list of over 500 Federal employees who were charged with being members of the American League for Peace and Democracy. Hearings on Un-American Activities, pages 6043 *et seq.* (1939).

When the list was published demands were promptly made on the floor of Congress that the employees named be dismissed. New York Times, June 10, 1940, page 8, column 2.

Although it was later established that many of those on the list had never belonged to the organization, no retraction or correction of the list was ever made.

The Committee's principal activity is the building of dossiers of individuals and organizations which do not conform to its standard of loyalty or Americanism. Even in 1943, after less than five years of existence, the Committee had accumulated a file of over 1,000,000 cards containing information on individuals and organizations. H. Rep. No. 2748, 77th Cong. 2d Sess. (1943), 2. The list has been constantly growing since then (R. 190).

The Committee's main weapon is publicity[6]—a public attack without affording the victim an opportunity for defense.

The Committee has repeatedly made it clear that one of its prime purposes is the elimination from public employment of all those whom it considers "Un-American" and "subversive". Hearings before Special Committee to Investigate Un-American Activities on H.R. 282, Vol. 9 (1939), 5447. A partial list of prominent government officials who have been publicly denounced by this Committee would include Franklin D. Roosevelt, Henry Wallace, Frank Murphy, Archibald MacLeish, Chester Bowles, David Lilienthal, Edgar Warren, Frances Perkins, Leon Henderson, Harold L. Ickes, Dr. Edward U. Condon. The average government employee observing the smearing of reputations by this Committee in the last ten years would require superhuman fortitude to withstand the pressure which this Committee puts on employees of government. Moreover, it is enough to frighten the most courageous to see what activities or ideas this Committee has during the course of years regarded as "subversive".

In 1941, the chairman of the Committee sent a list of 1,121 persons in Federal posts to the attorney general, charging that they were "Communists or affiliates of subversive organizations". In a letter accompanying the list, he urged:

> "The retention on the Federal payroll of several thousand persons who, to put the matter mildly, have

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[6] The Committee thus describes its methods: "* * * exposure is the most effective weapon that we have in our possession." 83 Cong. Rec. 7570 (1938). "* * * focus the spotlight of publicity upon their activities." H. R. Rep. No. 2, 76th Cong., 1st Sess., (1939), 13. "* * * by turning the light of pitiless publicity on the activities of organizations," id., 24. "It is the way of exposure—a way which conforms to the letter and spirit of democracy, and is at the same time more effective than a Gestapo," H. R. Rep. No. 1, 77th Cong., 1st Sess. (1941), 23, 24. "* * * this 'grand jury' will be in session to investigate un-American activities at all times." 91 Cong. Rec. 275 (1945). "* * * seek out and expose those activities which although legal are nonetheless un-American, subversive and contrary to the American concept." 92 Cong. Rec. 5217 (1946).

strong leanings toward Moscow will confirm the widely held suspicion that a large and influential sector of official Washington is utilizing the national emergency for undermining the American system of democratic government." New York Times, October 20, 1941, p. 1, col. 3.

It will be noted that it is not actual membership in the Communist Party that draws fire from the branch of the Government which controls the purse-strings, but "leanings toward Moscow". Ideas which have been condemned by the Committee include social and racial equality, H.R. 2, 76 Cong. 1st Sess. (1939); duty of government to support the people, *id.*; criticism of General MacArthur and Chiang Kai-Shek, H.R. 2233, 79th Cong. 2nd Sess. (1946); attacks upon cartels and other industrial organizations, id.; America is a democracy, 79th Cong., 2nd Sess., Daily Appendix, 740 (1946); opposition to the Franco Government of Spain, H.R. 2233, 79th Cong., 2nd Sess.; advocacy of a world state, *id.*; criticism of members of Congress, H.R. 2277, 77th Cong., 2nd Sess. (1942). If these be "subversive",[7] what shall be said of a government employee who acquits the leader of the Communist Party of a charge of contempt of the House Committee on Un-American Activities, especially when that Committee and the House of Representatives have solemnly declared, prior to the trial, that the said leader of the Communist Party was in "wilful, deliberate, and inexcusable" (R. 158) contempt?

[7] The opinion in the *Lovett* case reveals even this Court's difficulty with the term "subversive". The employee in Government, like every other person, finds himself required to conform to the dictates of the Committee on Un-American Activities without even possessing a standard or norm with which to guide his thinking, if such a thing were possible. Added, therefore, to his difficulties is the fear of uncertainty. What is "disloyal" or "subversive" or "un-American"? The answer is as numerous as the minds of men. Commager, "Who Is Loyal to America?" Harper's Magazine, September, 1947. Certainly Chairman Thomas was not reassuring when he stated in this trial that he would "assume that every member of our Committee now has a very good idea of what constitutes un-American activities" (R. 193), but he could not speak for "Mr. Rankin", nor "Mr. Wood, or Mr. Mundt, or Mr. Peterson, or any of the others" (R. 193).

Two judges of Courts of Appeals have expressed their views on the inroads which the Committee has made on freedom of opinion and conduct.

> "Here there can be no doubt of that intended and actual consequence of the investigation. The Committee announces its desire that the persons it finds guilty shall forfeit their jobs in public and private industry and shall be subject to prosecution for any collateral crimes which may have been disclosed, and generally shall be exposed pitilessly to public condemnation. That it is successful in its purpose the daily papers show. There can be no doubt of the obvious and direct abridgment of the right freely to speak and express one's opinions which is thus achieved."
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> Clark, J., dissenting in *United States* v. *Josephson*, 165 F. (2d) 82, 100, (C. C. A. 2), cert. denied 68 S. Ct. 609.

"The investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. Persons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views.

The investigation also restricts freedom of speech by forcing people to express views * * *. Witnesses before the House Committee are under pressure to profess approved beliefs. They cannot express others without exposing themselves to disastrous consequences. * * * That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the Court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who

might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak. There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure."

Edgerton, J., dissenting in *Barsky* v. *United States*, 167 F. (2d) 241, 254, 255 (App. D. C. 1947), cert. denied 68 S. Ct. 155, pet. rehearing pending.

What has been the effect of this Committee's activities? The President's Committee on Civil Rights stated: "A state of near-hysteria now threatens to inhibit the freedom of genuine democrats." Report, *To Secure These Rights* (1947), p. 49. "There is hysteria, in Washington and the country; the Thomas Committee has helped to whip it up, so has the not very well-informed clamor of some Congressmen outside that Committee; and the result is that we are making ourselves ridiculous in the eyes of the world." Andrews, *Washington Witch Hunt* (1949), p. 47. "The state of mind being created is a kind of plot-and-persecution system akin to paranoid obsession and like paranoia impervious to correction by rational argument." I. F. Stone, The Nation, November 8, 1947, 492. "A man with a family will think many times before speaking his mind fearlessly and critically when there lies ahead the threat of an Un-American investigation, a publicized branding, and his job gone. It is small consolation to know that you cannot be put in jail for your opinions if your opinions, freely expressed, end by starving your dependents." Martha Gelhorn, "Cry Shame!", New Republic, October 6, 1947, 21.

"One of the most startling manifestations of the police state in our time is the campaign of terror against liberal government officials, taking the form of Con-

gressional purges of federal employees, against whom have been leveled charges of disloyalty and Un-Americanism. * * * I call it startling because there has been nothing like it in the history of the American Republic; because it has operated irresponsibly and even unconstitutionally; because it has ignored the elementary judicial decencies; because it shows how legislative terrorism can function in the shadow world of political surveillance.

This may sound harsh; I mean it to be just. I am speaking of the entire record of the House Committee to Investigate Un-American Activities. I am speaking of its now famous campaign against the Thirty-Nine, begun in Congress in February, 1943, whose Anabasis has not yet found its adequate Xenophon; I am speaking of the effort to pass a bill of attainder through the expedient of attaching a rider to an appropriation bill precluding the payment of any funds to specific persons, thus using the power of the purse to achieve wholly unfiscal purposes; I am speaking of the vague and confused definition of what is subversive, on the basis of which the dismissal of devoted public servants was recommended; I am speaking of the instilling of fear into the hearts of tens of thousands of other public officials who felt that they might at any moment be denounced and dismissed, and both their names and careers infected with an ineradicable taint."

Lerner, M., "Freedom: Image and Reality" in *Safeguarding Civil Liberty Today* (1945), pp. 44, 45.

This, in summary, is the House Committee on Un-American Activities, the prosecuting witness in the case against the petitioner in the District of Columbia, and on the jury to decide the issue between them, sat seven government employees, allegedly "impartial". If under circumstances such as these, government employees can be said to be "indifferent as they stand unsworn" (Coke on Littleton, I, 155 a (d)), the provisions of the Sixth Amendment to the Constitution have a hollow ring.

B. Attacks Upon Employee Loyalty by Government Agencies Other Than the House Un-American Activities Committee

Employee "loyalty" has not been the concern exclusively of the House Un-American Activities Committee. Many other governmental agencies have been active in the field.

In 1939, Congress passed the Hatch Act, 18 U. S. C. Section 61 i (1946). This Act provided:

> "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person."

The Civil Service Commission issued the following ruling in 1940 to implement the Hatch Act (Departmental Circular No. 222, June 20, 1940):

> "The Civil Service Commission has implemented Section 9A of the Hatch Act by ruling that as a matter of official policy, it will not certify to any department or agency the name of any person when it has been established that he is a member of the Communist Party, the German Bund, or any other Communist, Nazi, or Fascist organization."

As a result of this ruling, all new employees of the Government have from that time signed a statement upon entering into government service, that they are not members of the Communist Party.

Moreover, Congress has, since 1941, attached to all appropriation acts a rider which specifies that no part of the funds appropriated should

> "be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence."

A vague standard of "loyalty" which served to destroy virtually all theretofore established safeguards for the protection of government employees was established in 1942, in regulations which provided that an employee or potential employee would be denied clearance by the Civil Service Commission for government employment or transfer within the Government where there existed "a reasonable doubt as to his loyalty to the Government of the United States". 7 Fed. Reg. 7723, Section 18.2(c) (1942). No standard at all was prescribed for the so-called "sensitive agencies." As early as June, 1940, Congress authorized the War and Navy Departments[8] and the Coast Guard to remove an employee summarily when such "immediate removal is, in the opinion of the Secretary concerned, warranted by the demands of national security." 54 Stat. 679, 713 (1940), 50 U. S. C. App., Section 1156 (1946).[9]

[8] Of the seven jurors in this case who were government employees, two were employed by the Navy Department (R. 56-89), while one juror who was an employee in the Department of Commerce is related to a Navy employee (R. 68).

[9] This provision has the effect of eliminating the statutory protections against discharge accorded permanent status full-time employees. Andrews, *Washington Witch Hunt* (1948), p. 11. In 1946 the McCarran rider extended this authority to the Secretary of State. Pub. L. 490, 79th Cong., approved July 5, 1946; 60 Stat. 453. State Department regulations pursuant to this authority provided that an employee might be dismissed if he were "a person who has such basic weakness of character or lack of judgment as reasonably to justify the fear that he might be led into" a course of action condemned by the statute. New York Times, October 8, 1947, p. 8, cols. 5, 6. It was under these regulations that 10 State Department employees were dropped in the summer of 1947 as "poor security risks". *Andrews, supra*, p. 12.

Nor was all this merely a matter of unenforced statutes and regulations. Under the constant urging and speeches of members of Congress an extensive and widespread process of investigation was begun of which no Federal employee or resident of Washington could be long unaware. In 1941, Congress appropriated $100,000 to finance an investigation of alleged subversive employees by the Federal Bureau of Investigation. Department of Justice Appropriation Act, 55 Stat. 289, 1941.

The Federal Bureau of Investigation throughout the war engaged in extensive investigation of Federal employees. From July 1, 1942 to June 30, 1946, the Federal Bureau of Investigation conducted investigations of 6,193 employees. Report of the President's Temporary Commission on Employee Loyalty (1947), 16-17. In the period from July 1, 1940, through March 31, 1947, the Civil Service Commission conducted loyalty investigations of 395,000 employee applicants or actual government employees. Hearings Before Committee on Post-Office and Civil Service on H. R. 3588, 80th Cong., 1 Sess. (1947) 54. In addition, special investigations within the War and Navy Departments were conducted by the Office of Naval Intelligence and the Military Intelligence Division.

In the halls of Congress, the issue of the loyalty of government employees was raised continually and government employees were constantly under attack. In 1943, a Special Sub-Committee was established in the Appropriations Committee to investigate the alleged "subversive" activities of 38 prominent Federal workers. As a result of the labors of this committee, the dismissal of 3 employees was recommended—Robert Morss Lovett, Goodwin B. Watson, and William E. Dodd, Jr. 89 Cong. Rec. 4581, *et seq.* (1943).

With the close of the war pressures from Congress to remove "subversive" employees from the Government increased. In 1946 the House Civil Service Committee appointed a sub-committee to make an investigation "with

respect to employee loyalty and employment policies and practices in the Government of the United States." This committee reported:

> "The reason for comparatively few decisions of eligibility on loyalty grounds resulting in the actual removal of employees from Government service should be given study and the reason therefor clearly stated." [10]

In the 1946 Congressional elections the issue of the loyalty of government employees was raised not only in Washington but throughout the country. Following the election the President appointed a Temporary Commission on Employee Loyalty. Executive Order No. 9806, 11 Fed. Reg. 13863 (1946). The Commission consisted of representatives of the Civil Service Commission, the Department of Justice and the Treasury, State, War and Navy Departments. Their report was made public in March, 1947—three months before the jury was selected for the trial of the instant case.

The conclusions of this report were that existing laws and regulations failed to protect the Government sufficiently and did not "furnish adequate protection against the employment or continuance in employment of disloyal or subversive persons." The recommendations of the Commission were incorporated in Executive Order 9385, known as the Loyalty Order, issued March 22, 1947, 12 Fed. Reg. 1935 (1947).

The result of the intervention by the Government into the realm of employee political attitudes, beliefs and opinions has inevitably been to create among government employees insecurity, fear and prejudice with respect to these matters. They are not qualities which produce impartial juries in a case of this sort.

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[10] *Committee on the Civil Service*, Report of Investigation with Respect to Employee Loyalty and Employment Policies and Practices in the Government of the United States, 79th Cong., 2d Sess. 6 (1946).

C. Executive Order 9835 [11]

Three months before the voir dire in this case, each prospective member of the jury who was a government employee was under official notice that his employment was in jeopardy, that the question of his attitude toward the political organization headed by the petitioner would be decisive in determining whether he would be severed from his life's vocation, and that such determination would be made on the basis of official action taken by the agency prosecuting the petitioner.

The salient provisions of the Executive Order are the following:

"PART I

3. An investigation shall be made of all applicants of all available pertinent sources of information and shall include reference to:

a) Federal Bureau of Investigation files.

b) Civil Service Commission files.

c) Military and naval intelligence files.

d) The files of any other appropriate government investigative or intelligence agency.

e) House Committee on Un-American Activities files.

f) Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county and state law-enforcement files.

g) Schools and colleges attended by applicant.

h) Former employers of applicant.

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[11] For an analysis of this order and the procedures taken under it, see Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale L. J. 1 (1948).

i) References given by applicant.
j) Any other appropriate source.

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PART IV

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2. * * * the investigative agency may refuse to disclose the names of confidential informants * * *.

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PART V

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

* * * * * * *

f) membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

* * * * * * *

PART VI

1. Each department and agency of the executive branch, the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying

material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a) The Federal Bureau of Investigation shall check such names against the records of persons concerning whom there is a substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information."

A government employee who acquitted the General Secretary of the Communist Party of a charge of contempt of the House Committee on Un-American Activities was therefore bound to consider, in the light of the Executive Order 9835, that "activities • • • which may be considered in connection with the determination of disloyalty may include • • • sympathetic association with any • • • communist"; that if a fellow juror reported the vote and discussion of the employee to the Federal Bureau of Investigation, the "name of the confidential informant" could be withheld.

Professor Thomas I. Emerson, and his colleague, David M. Helfeld, of Yale University Law School, after careful study of the loyalty program in action, concluded:

"The cumulative influence of all these factors bears heavily upon the average government employee. He must, of course, avoid at all costs activity which may bring him within the area of disqualification established by the program. But more important, he must avoid even the *appearance or suspicion* of such activity. He is acutely aware that an F.B.I. investigation can be initiated upon the basis of a complaint made by an unfriendly or psychopathic acquaintance. He knows that such an inquiry means probing among his friends, neighbors, enemies and business acquaintances. And he knows also that any 'derogatory information,' not to say rumor and gossip, will be permanently recorded. This may well mean that he will be the first to go at the next tightening of the loyalty standards. Similarly, few government workers want to take the risk of incurring a hearing before a loyalty board. It involves time, energy, intense nervous

strain and insecurity. More, it leaves a stigma which even exoneration cannot entirely wipe out.

For these reasons, the normal government worker, faced with such conditions, avoids joining organizations, attending meetings, associating with others, reading literature, or holding views that might be considered questionable. He shrinks from making unorthodox proposals in his work or suggesting experimentation. He is under constant pressure to conform to the conventional and safe. He is placed in fear of exhibiting the very qualities most sought after by competent administrators in private industry as well as in government" (58 Yale L. J. 1, 76).

The activities of the Federal Bureau of Investigation are a source of constant worry to the federal employee. Under Executive Order 9835, the F.B.I. is charged with the political surveillance of all government employees. The rumors of wiretapping which abound in Washington have been confirmed by the Director of the Bureau himself. 58 Yale Law Journal, 401, 405. While Mr. Hoover denies the existence of a single instance "wherein a telephone was tapped in the investigation of a Federal Employee Loyalty Program case," he admits openly that wiretapping does occur in cases involving "internal security." This distinction may be apparent to Mr. Hoover; it is doubtful that the average government employee will understand it. This conduct on the part of public officials (58 Yale Law Journal, 414) is itself calculated to demoralize the ordinary public servant. "Wire tapping and other unethical devices may lead to a variety of oppressions that may never reach the ears of the courts." S. Rep. No. 1304, 76th Cong. 3rd Sess., quoted in Rosenzweig, "The Law of Wire Tapping" 33 Cornell L. Q. 93. John Lord O'Brian writes in "Loyalty Tests and Guilt by Association" (61 Harv. L. Rev. 592):

"What must be the inevitable effect of this kind of institutional practice, with its secret investigations and vast numbers of secret dossiers, upon the freedom of the individual? * * * What anxieties of mind, what

prolonged periods of worry, what restraint upon initiative, will result from their knowledge that their private lives are being secretly investigated, no one can say. But neither can anyone assert that this shadow upon their activities, however intangible and subtle, will not act as a constraint upon their freedom and their sense of independence. * * * The practice of secret investigations is an aspect of Government in which, up to now, no widespread interest has been aroused. How far, if at all, we should tolerate a policy of having our government officials build up, through secret investigations, these enormous numbers of secret dossiers dealing with the private lives of the people? For sound historical reasons the founding fathers dreaded above everything else secret activities in government operation. Must we take a different view?"

The cold record which formally describes the process through which "loyalty" has become a major factor in federal employment barely reaches the psychological realities in which prejudice and fear are rooted.

In considering the impact of the programs which we have described upon the minds of employees to determine whether they are capable of serving impartially in a case such as this, we must bear in mind certain considerations which intensify what would be the normally demoralizing and coercive impact of this process.

We are dealing with government employees, whose sensitivity to threats to tenure is notorious. We are dealing with individuals who have abandoned the prospect of obtaining non-governmental employment, and we are dealing with a compact community of such individuals. We are dealing with psychological reactions, with fears which are intensified because they are shared. Conditions affecting the morale or political independence of one or a group of government employees inevitably affect the morale and political independence of all. Moreover, these conditions affect the thinking and attitudes not only of government workers, but of all persons in the District. In short,

when this case was tried in 1947 the District of Columbia was the seat of prejudice, fear and repression.[12] Can it be seriously questioned that in such an atmosphere letter carriers Grant (R. 55) and Mackall (R. 83) who had been employed for 29 and 20 years respectively in that capacity would not at the very least have feared the loss of their jobs and pension rights had they acquitted petitioner? Would it have been "far fetched" (*Wood* case, *supra*, at p. 150) for all of the three post office employees who served on the jury to assume that the department which employed them would be particularly vigorous in construing and applying the Loyalty Order? See *Bertram Alexander Washington, et al.* v. *Clark, et al.*, 84 Fed. Supp. 964. Would it be "far fetched" to assume that the two jurors (R. 57, 83) who were employed by a "sensitive" agency, the Navy, did not fear abrupt and arbitrary dismissal should they

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[12] An example of the atmosphere in the District is supplied in an article by Professor Henry Steele Commager, "Who is Loyal to America?" in Harper's Magazine, September, 1947:

> "On May 6, a Russian-born girl, Mrs. Shura Lewis, gave a talk to the students of the Western High School of Washington, D. C. She talked about Russia—its school system, its public health program, the position of women, of the aged, of the workers, the farmers, and the professional classes—and compared, superficially and uncritically, some American and Russian social institutions. The most careful examination of the speech—happily reprinted for us in the Congressional Record—does not disclose a single disparagement of anything American unless it is a quasi-humorous reference to the cost of having a baby and of dental treatment in this country. Mrs. Lewis said nothing that had not been said a thousand times, in speeches, in newspapers, magazines and books. She said nothing that any normal person could find objectionable.
>
> "Her speech, however, created a sensation. A few students walked out on it. Others improvised placards proclaiming their devotion to Americanism. Indignant mothers telephoned their protests. Newspapers took a strong stand against the outrage. Congress, rarely concerned for the political or economic welfare of the citizens of the capital city, reacted sharply when its intellectual welfare was at stake. Congressmen Rankin and Dirksen thundered and lightened; the District of Columbia Committee went into a huddle; there were demands for house-

acquit the General Secretary of the Communist Party! None of the government employees who served on the jury could immunize themselves from the tensions and pressures which existed in Washington in 1947 and which deprived them of the capacity for rendering an impartial verdict in a case of this character.

Moreover, it must be borne in mind that those who perform services for the Government to a large extent identify themselves with its policies. And when this case was tried, the policies of the Government were vigorously anti-Communist. Indeed it is accurate to say that the District of Columbia is the fountainhead of the anti-Communist hysteria in the United States. As one periodical writer observed in the summer of 1947,

"* * * the anti-Red hysteria has reached greater intensity in Washington than in any other city of the

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cleaning in the whole school system, which was obviously shot through and through with Communism.

"All this might be ignored, for we have learned not to expect either intelligence or understanding of Americanism from this element of our Congress. More ominous was the reaction of the educators entrusted with the high responsibility of guiding and guarding the intellectual welfare of our boys and girls. Did they stand up for intellectual freedom? Did they insist that high school children had the right and duty to learn about other countries? Did they protest that students were to be trusted to use intelligence and common sense? Did they affirm that the Americanism of their students was staunch enough to resist propaganda? Did they perform even the elementary task, expected of educators above all, of analyzing that much-criticized speech. Not at all. The District of Superintendent of Schools, Dr. Hobart Corning, hastened to agree with the animadversion of Representatives Rankin and Dirksen. The whole thing was, he confessed, 'a very unfortunate occurrence,' and had 'shocked the whole school system'. What Mrs. Lewis said, he added gratuitously, was 'repugnant to all who are working with youth in the Washington schools', and 'the entire affair contrary to the philosophy of education under which we operate'. Mr. Danowsky, the hapless principal of the Western High School, was 'the most shocked and regretful of all'. The District of Columbia Committee would be happy to know that though he was innocent, he had been properly reprimanded!"

land. The result has been an unprecedented demoralization of government employees. From one day's end to the next, they don't know when the noiseless axe may fall—the silent dismissal without statement of charges, without advance notice and without right of appeal. In every department old faces have myseriously disappeared without explanation." New Republic, July 14, 1947, 8.

See also, Andrews *Washington Witch Hunt, supra, passim;* Rogge, *Our Vanishing Liberties* (1949), Sanctan, "Dossiers For the Millions"; The Nation, September, 1948, p. 336; "The Case of Mr. N," New York Post, March 7, 1949.

It is not without reason, therefore, that a jurist who has served in the federal court in Washington, D. C., for more than ten years, recently stated:

"Government employment alone does not disqualify a juror in a prosecution for larceny, United States v. Wood, 299 U. S. 123, or violation of the narcotics laws. Frazier v. United States, 335 U. S. 497. But government employment is not commonly known to be endangered by sympathetic association with thieves or drug peddlers. It is commonly known to be endangered by sympathetic association with Communists. Government employees are therefore anxious, in various degrees, according to their temper and circumstances, to avoid seeming to sympathize with Communists. Acquittal sometimes indicates, and is often thought to indicate, that the jury sympathized with the accused. It is therefore prudent for government employees to convict an alleged Communist and imprudent to acquit him. For government employees to acquit this alleged Communist leader would have been particularly imprudent. Trial by jurors whose personal security will either actually or apparently be promoted by conviction and endangered by acquittal is not 'trial by an impartial jury' and is not due process of law."

Edgerton, J. dissenting in *Eisler* v. *United States*, decided April 18, 1949, unreported.

If this be the view of a jurist in the District of Columbia, it is submitted that the petitioner's challenge to government employees in this contempt proceeding brought against him by the Committee on Un-American Activities should have been sustained.

IV

No justification exists for sustaining the decision below.

It was urged by the Government in its opposition to the petition for the writ of certiorari that the petitioner was given opportunity to inquire of the government employees whether they were biased or prejudiced against him; that all had stated they would render a fair verdict.

The short answer to this contention is that the inquiry should never have been made and that, as in other cases where membership in a class is, *per se*, a ground for disqualification, government employees in a case of this sort should have been disqualified without engaging in a futile attempt to require the prospective jurors subjectively to deny what objectively is so clear.

Moreover, even if the Trial Court did not err in not finding bias implied in law, its inquiry was improperly confined to eliciting the subjective responses of the jurors without an examination of the objective circumstances. The *Crawford*, *Wood* and *Frazier* cases all condemn the method resorted to by the Trial Court and approved by the court below (R. 413-414). See *supra* pages 19-20.

These cases express the well-established view that the juror is not the judge of his own competency, impartiality and freedom from prejudice. The determination of his qualifications to serve as a juror is a judicial function, and the judge, especially in the federal courts, is not bound by the testimony of the juror. 31 *American Jurisprudence*, "Jury", Sections 109, 110. Any other principle of law

would vitiate the constitutional protection of the system of trial by jury.

In the *Burr* Case, Chief Justice Marshall stated (1 Burr's Trial (464)).

> "Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is that the law suspects the relation of partiality; suspects his mind to be under a bias which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury, because it suspects prejudice; because in general persons in a similar situation would feel prejudice."

In *United States* v. *Chapman*, 158 F. (2d) 417 (C. C. A. 10, 1946), cert. denied 335 U. S. 860, the court stated (at p. 421):

> "It is said that when a juror testifies that he believes he can, and the court finds as a matter of fact that he will, if selected, render an impartial verdict on the evidence, he is an impartial juror as required by the law. Rice v. Emerson, supra. A juror's answer to questions touching his state of mind is primary evidence of his competency, but the ultimate question is a judicial one for the court to decide, and in case of doubt, justice demands that the challenge be allowed. Scribner v. State, 3 Okl. Cr. 601, 108, p. 422, 35 L. R. A. N. S. 983; Temple v. State, 15 Okl. Cr. 176, 175 p. 733, 736: Crawford v. United States, 212 U. S. 183, 197, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. 392; 31 Amer. Juris, p. 638. Only by a punctilious regard for a suspicion of prejudice can we hope to maintain the high traditions of our jury system. We must make sure that the lamentations of the unsuccessful litigant is without foundation, either in fact or circumstance."

See, also, *Hillyard* v. *State*, 116 Tex. Cr. 557, 570; *Temple* v. *State*, 150 Okl. Cr. 176, 185; *Lane* v. *State*, 168 Ark. 528, 533; 3 Wharton, *Criminal Procedure* (1918 Ed.) 2046; Osborn, *The Mind of the Juror* (1937), page 89.

It is psychologically absurd to permit a juror to establish his own freedom from prejudice. It is equally absurd to expect a prospective juror to admit that a fear of economic reprisal might influence his decision. For to admit that he had such a fear would be publicly to confess a lack of confidence in his Government, the House Committee and the loyalty investigators and boards and to accuse them of improper practices. Such a statement in itself would invite reprisal. It is for these and related reasons that courts reject the statements of employees, victims of unfair labor practices under the National Labor Relations Act, that they were not coerced and improperly influenced by their employers. See, for example, *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219.

It is important to bear in mind that a disclaimer of prejudice in a case of this kind cannot be assimilated to a situation such as one in which the prospective juror's acquaintance with the attorney on either side forms the basis for an inquiry into his bias. In such a situation it may be possible for a juror to attempt to evaluate the effect of this single, isolated fact upon his capacity to be fair. However, in a case such as this, the considerations which may sway the juror's mind are not revealed to him as a threshold matter. He is in no position to evaluate or to discount the impact upon him of such matters as the opening and closing statements of the prosecutor, the evidence adduced, the appeals which will be made to him touching upon or perhaps awakening imponderable deeply felt values—as to all of which he has no foreknowledge.

The court below (R. 414) sought to justify the trial court's rejection of petitioner's challenge of government employees for cause on the ground that petitioner sought to

impose upon government employees a "blanket disqualification". But the disqualification is no more "blanket" than the fears and prejudice which governmental activities in the area of employee "loyalty" have created. It is no more "blanket" than Executive Order 9835.

The court below (R. 414) attributed to petitioner an attempt to impose upon government employees a "bill of attainder." Disqualification for jury service in cases of this character can hardly be regarded as punishment. And the legislative imposition of far greater disabilities upon government employees has been approved by this Court. *United Public Workers* v. *Mitchell*, 330 U. S. 75. Moreover, the shoe is on the other foot; petitioner is faced with a serious punishment; the members of the jury were civil servants who may well be regarded in a case of this type as agents of the legislature and the other elements of the procedure by which petitioner was tried were of such an inbred character as the result of the role of the House Committee as to raise a serious question whether the entire trial was not a type of legislative trial of an individual which is forbidden by the Constitutional ban on bills of attainder. Art. I, Section 9, Cl. 3 of the Constitution.

The court below validated the trial court's procedure on the basis of the *Wood* case. We believe that the record and the decision in the *Wood* case reflect a deep concern by Chief Justice Hughes lest the removal of the disqualification announced in that case become a means of denying a fair trial to defendants in the District of Columbia in cases involving the Government. To avoid possible abuse, the Court erected clear safeguards. These have been largely ignored in the District and the decision has been converted into a shield for sheltering government employees in a "blanket" fashion, from disqualification from jury service for bias in appropriate cases. To use the *Wood* decision as a justification for what many regard as a form of jury-packing is to stand the decision on its head.

Finally, petitioner's jury cannot be justified either on the ground that the jury was drawn from the vicinage or that it represented a cross-section of the community. A defendant in a criminal case is entitled to a trial in the State where the crime shall have been committed (Constitution, Article III, Section 2, Clause 3) and by an impartial jury of the State and District wherein the crime shall have been committed (Amendment VI).

Those provisions were designed to give a defendant in a criminal case the advantage of a good reputation among his neighbors (see *United States* v. *Johnson*, 323 U. S. 273) but not, as was done here, to permit a prosecutor to exploit prejudice against a defendant. Compare *Murphy* v. *Extraordinary and Special Term*, 294 N. Y. 440. It was, among other reasons, to avoid a trial by a biased jury that the defendant in this case moved to transfer the case to another district (R. 27-32). If the trial court was unwilling to grant petitioner's motion (R. 41), it should at least have been meticulously careful to alleviate the adverse conditions under which he was forced to defend himself by eliminating government employees from the jury. In failing to do so, the trial court permitted the solid protection of Article III, Section 2, Clause 3, and the Sixth Amendment to become converted into instruments of oppression.

What we have said above applies also to any possible contention that petitioner was tried by a cross-section of the community. Trial by a cross-section, like trial in the vicinage, is a unilateral benefit to a defendant in a criminal case. When it fails to serve its purpose of producing impartial jurors and instead insures partial or biased jurors it cannot be justified under the Constitution.

To assert that considerations relating to vicinage or cross-section justify the jury imposed upon petitioner is to engage in a species of constitutional cannibalism under which the provisions relating to jury trial are used not to protect the rights of defendants but to devour them.

CONCLUSION

The prosecution of the petitioner here was not conducted by the Government as a nominal plaintiff. The prosecution was allegedly intended to vindicate the authority of the House of Representatives. At the trial, the prosecuting witness was the Government in the person of Congressmen Thomas and Mundt, as well as the chief investigator of the Committee of the House.

The petitioner was charged with an intentional and deliberate contempt of Government, or at least one of its organic bodies. He denied that charge and asked, as was his right, for a trial of the issue by a fair and impartial jury. He received a trial by a jury, the majority of whose members were the employees of the Government which had initiated the charge, prosecuted the charge, testified as to the truth of the charge, and instructed the jury as to the law applicable to the charge.

The compulsions upon the government jurors created by the very Committee which instigated and was prominently identified with the prosecution, by the Federal Bureau of Investigation and by loyalty boards were such that the jurors did not stand "indifferent". Coke on Littleton, I, 115a (d), 156. See also Pollock and Maitland, *History of English Law* (1923), II, 619, Bacon's *Abridgment*, III, 722; Bentham, *The Elements of the Art of Packing* (1821), 219.

A charge in a criminal case that a juror is disqualified by reason of his relationship to the Government brings into play considerations involved in the origin and growth of trial by jury which lie at the very root of constitutional democracy. For the historic insistence upon jury trial as a prerogative of the people rests precisely upon the fact that it afforded the individual accused of crime the protection of 12 individuals not subject to direct influence of the crown against vengeful or arbitrary action by the crown. See Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," 39

Harv. L. Rev. 917, 923. See also Lesser, *Historical Development of the Jury System* (1894), 143; von Moschzisker, "Historic Origin of Trial by Jury," 70 U. of Pa. Law Rev. 1, 85.

This is a political case in a double aspect. The interest which is sought to be vindicated here is not that of a nominal sovereign seeking to redress an injury to a private person in the public interest but that of the Government itself asserting an injury to itself and seeking to impose punishment for that reason. And the defendant is identified with an opposition political party. The history of trial by jury and its vitality as an institution is in large measure explained by the fact that it was a bulwark of political liberty.[13]

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[13] See Blackstone's Com. Bk. IV, p. 34; Phillips, *Powers and Duties of Juries*, p. iv; Forsythe, *The History of Trial by Jury* (2nd Ed., 1878), p. 363. Englishmen virtually rediscovered the jury system and fought for its preservation as a bulwark of popular liberty during the sedition libel controversies of the eighteenth century when an effort was made to confine the role of the jury in these political cases to a determination of whether the alleged seditious libel was in fact circulated. Lord Mansfield's doctrine that it was the province of the court alone to judge of the criminality of a libel, "was wholly subversive of the rights of juries in cases of libel." May, Constitutional History of England (1899), II, p. 114. The author further states: "Trial by jury was the sole security for the freedom of the press; and it was found to have no place in the law of England." The struggle to confirm the right in juries to judge of both law and fact was not wont until the passage of Fox's Libel Act in 1792. May, *supra*, 122. Thomas Erskine who played such a prominent role in the defense of political liberties, threatened by the sedition libel prosecutions, spoke for all liberty-loving Englishmen when he said that the system of trial by jury was "intended by the wise founders of the government, to be a protection to the lives and liberties of Englishmen, against the encroachments and perversions of authority in the hands of fixed magistrates. * * * If the jury by an appeal to their consciences are to be thus limited in the free exercise of that right which was given them by the constitution, to be a protection against judicial authority where the weight and majesty of the crown is put into the scale against an obscure individual, the freedom of the press is at end." *The Trial of Stockdale*, to which is subjoined an argument in support of the Rights of Juries (1790), pp. 117, 125, 191.

Our institutions, were founded by men who believed that the system of trial by jury was basic to political liberty. In the Declaration of Independence, the colonists "submitted to a candid world" that a despotic king had deprived them "of the benefits of Trial by Jury". And while the Constitution of 1789 provided that the "Trial of all Crimes except in Cases of Impeachment, shall be by jury", so jealous were the people of this fundamental right that they compelled the additional provision in the Sixth Amendment that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed * * *". Elliot's *Debates* (2nd ed.), II, 109; III, 541, 542, 544, 545, 546; IV, 143, 148, 154, 166, 171. Moreover the observation of and experience with the corruption and intimidation of jurors in England.[14]

[14] The jury system in the reign of Queen Elizabeth is described in David Hume's *History of England*, published on the eve of the American Revolution (1764-1772). That work states (Lovell ed. n. d., Vol. IV, pp. 349-350):

> "The queen's menace of trying and punishing Haywarde for treason could easily have been executed, let his book have been ever so innocent. While so many terrors hung over the people, no jury durst have acquitted a man when the court was resolved to have him condemned. The practice, also, of not confronting witnesses with the prisoner, gave the crown lawyers all imaginable advantage against him. And indeed there scarcely occurs an instance during all these reigns, that the sovereign or the ministers were ever disappointed in the issue of a prosecution. Timid juries, and judges who held their offices during pleasure, never failed to second all the views of the crown. And as the practice was anciently common of fining, imprisoning, or otherwise punishing the jurors, merely at the discretion of the court, for finding a verdict contrary to the direction of these dependent judges, it is obvious that juries were then no manner of security to the liberty of the subject." See also Trevelyan, *English Social History* (1944), p. 60.

had impressed upon the Founders the fundamental necessity for impartial jurors.[15]

We submit that petitioner's constitutional rights to an impartial jury were denied here. What is involved here, however, are more than petitioner's personal rights. The preservation of the constitutional right to a trial by a fair and impartial jury protects in fact essential social processes that make constitutional government possible. "A government which sells or denies justice fails in one of its chief functions." Pound, *Law and the Administration of Justice*, (Nanking, 1947), p. 72. Professor Chafee, a close student of the events of the 1920's notes that the "human machinery broke down at a second point—the jury". Chafee, *Free Speech in the United States* (1941) p. 70. Noting the failure in the administration of justice as reflected in the selection of biased juries in cases involving civil liberties, Professor Chafee concludes (73): "The solution should not only give justice, but be so plain as to satisfy all classes, in so far as that is possible, that they are getting justice." Compare *Ballard* v. *United States*, 329 U. S. 187, 195.

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[15] "It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of." Holmes at the Massachusetts Convention, Elliot's *Debates*, II, 109; "They may be tried by the most partial powers, by their most implacable enemies, and be sentenced and put to death, with all the forms of a fair trial * * * (the) right to challenge partial jurors * * * is as valuable as the trial by jury itself." Patrick Henry in the Virginia Convention, Elliot's *Debates*, III, 542. "What made the people revolt from Great Britain? The trial by jury, the great safeguard of liberty, was taken away, and a stamp duty was laid upon them." McDowall in the North Carolina Convention, Elliot's *Debates*, IV, 143. "Jurors are called the bulwarks of our rights and liberty; and no country can ever be enslaved as long as those cases which affect their lives and property are to be decided, in a great measure, by the consent of twelve honest, disinterested men, taken from the respectable body of yeomanry." Spencer in the North Carolina Convention, Elliot's *Debates*, IV, 154.

The standards of due process of law, the provisions of Article III, Section 2, clause 3 and of the Sixth Amendment as well as proper standards for the administration of criminal justice in the Federal courts (*McNabb* v. *United States*, 318 U. S. 332; *Fay* v. *New York*, 332 U. S. 261), all require that the petitioner's conviction be set aside.

Respectfully submitted,

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APPENDIX

1. CONSTITUTION, ARTICLE III, SECTION 2, PARAGRAPH 3.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be such Place or Places as the Congress may by Law have directed.

2. CONSTITUTION, AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. SECTION 121 (b), LEGISLATIVE REORGANIZATION ACT OF 1946.

Legislative Reorganization Act of 1946, 79-2, Public No. 601, ch. 753, section 121, establishing the House Committee as a standing committee of the House of Representatives and defining the powers and duties of that committee:

* * * * * * *

RULE X

STANDING COMMITTEES.

(a) There shall be elected by the House at the commencement of each Congress, the following standing committees: * * * 17. Committee on Un-American Activities to consist of nine members.

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Rule XI

Powers and Duties of Committees.

* * * (q) (1) Committee on Un-American Activities.

(A) Un-American Activities.

(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendants of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

* * * * * * *

On January 3, 1947, the House of Representatives by resolution (H. Res. 5) adopted as the rules of the House "all applicable provisions of the Legislative Reorganization Act of 1946" and the rules of the House of Representatives of the Seventy-ninth Congress as the rules of the House of the Eightieth Congress (93 Cong. Rec. 36).

4. EXECUTIVE ORDER No. 9835.

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT.

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I

Investigation of Applicants

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.
b. Civil Service Commission files.
c. Military and naval intelligence files.
d. The files of any other appropriate government investigative or intelligence agency.
e. House Committee on un-American Activities files.
f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
g. Schools and colleges attended by applicant.
h. Former employers of applicant.
i. References given by applicant.
j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II

Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing de-

partment or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III

Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed

necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney Gen-

eral, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV

Security Measures in Investigations

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

PART V

STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of

another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI

MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents

and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN

THE WHITE HOUSE